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## An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims

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# An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims

Casey Martinez\*

## INTRODUCTION

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Annamarie Chiarini’s relationship was quickly spiraling out of control.<sup>1</sup> Her boyfriend had become increasingly jealous and paranoid over the course of their 7-month relationship. The relationship reached a breaking point when an argument over Ms. Chiarini’s work attire sent her boyfriend into a rage during which he insulted her and accused her of sleeping with male colleagues.<sup>2</sup> The fight was the last straw; she ended the relationship.<sup>3</sup> The day after their fight, Ms. Chiarini’s now ex-boyfriend called and threatened her.<sup>4</sup> He said that he would auction off a CD on eBay that contained dozens of explicit pictures of Ms. Chiarini, pictures she had reluctantly allowed him to take after months of nonstop coercion.<sup>5</sup> Ms. Chiarini sought protection from local police, but they told her that no crime was committed and there was nothing they could do.<sup>6</sup>

Ms. Chiarini’s ex-boyfriend followed through on his threat.<sup>7</sup> He set up an eBay auction for the CD, using her employer’s name and her position with that employer in the tag line for the auction.<sup>8</sup> He then sent links to Ms. Chiarini’s

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<sup>1</sup> Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don’t Want Anyone Else to Face This*, THE GUARDIAN (Nov. 19, 2013, 7:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Chiarini, *supra* note 1.

<sup>8</sup> *Id.*

friends and family, and posted a link on her employer's Facebook pages.<sup>9</sup> Again, Ms. Chiarini called the police and again, they refused to intervene.<sup>10</sup> To make matters worse, the officers from whom she sought protection laughed and essentially blamed her for the incident.<sup>11</sup> Though the auction came down after complaints to eBay, Ms. Chiarini was shaken and disturbed.<sup>12</sup> She began ritualistically Googling her name, fearing her ex may strike again.<sup>13</sup> A year later, her fears were confirmed.<sup>14</sup> This time, her ex posted her photos on a porn site with a tag line inviting interested men to "come get it."<sup>15</sup> Ms. Chiarini's ex included her name, employer, and details about where she lived in the posting.<sup>16</sup> With her photo and personal information online, Ms. Chiarini feared that she could be physically harmed.<sup>17</sup> She went to the police and was again turned away because there was nothing they could do unless she was physically harmed.<sup>18</sup>

Two things are striking about Ms. Chiarini's story. First, incidents like this are becoming increasingly common. Second, when the police told her no crime had been committed, they were correct. There are currently only two states, California and New Jersey, which have enacted laws to fight "revenge porn."<sup>19</sup> This paper will evaluate the current state of law and argue that all states should outlaw revenge porn and that Congress should amend 47 U.S.C. § 230 in order to protect victims of revenge porn.

## I. WHAT IS "REVENGE PORN"?

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While revenge porn, sometimes called "involuntary porn,"<sup>20</sup> can take many forms, the most common form occurs when "spurned former lovers post[] sexualized pictures [or videos] of their ex-wives and ex-girlfriends on a public

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Chiarini, *supra* note 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Lorelei Laird, *Striking Back at Revenge Porn*, 99-NOV A.B.A. J. 44, 47 (2013).

<sup>20</sup> *Id.* at 46.

forum so that others can leer at and demean them.”<sup>21</sup> However, a person need not send pictures or videos to a lover or spouse to be victimized. Photos and videos can be “acquired through hacking, theft by repair people, or false personal ads.”<sup>22</sup> One hacker acquired photos by using malicious computer software that allowed him to “capture [compromising] images using [the victims’] own computer camera [.]”<sup>23</sup>

These photos and or videos can then be sent to the victim’s friends, family, or colleagues and are often posted on websites that specialize in displaying this kind of material. This article will discuss these websites in further detail but, in an effort not to promote these sites, will not mention any of them by name. A simple online search will bring up a multitude of them as the number of these sites is dramatically increasing.<sup>24</sup> Images and videos posted to revenge porn sites tend to be accompanied by personal information such as a victim’s “real name, city and state, and often links to social media profiles.”<sup>25</sup> The purpose of this is twofold: it jeopardizes the victim’s safety and helps “get the pictures high in Google search results[.]”<sup>26</sup> Victims of revenge porn tend to be young women, but men can also become victims.<sup>27</sup>

## II. THE REAL LIFE HARM CAUSED BY DIGITAL IMAGES

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The obvious consequence of revenge porn is embarrassment. This embarrassment is often compounded by the fact that revenge porn sites often include comment sections.<sup>28</sup> Visitors tend to leave comment’s that are “sexual, crude and insulting.”<sup>29</sup> This shame and humiliation is not limited to the digital world as victims who report or discuss these postings are often blamed and written off “as stupid or slutty for taking the photos.”<sup>30</sup> Victims of revenge porn can

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<sup>21</sup> David Gray et al., *Symposium on Cybercrime: Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013).

<sup>22</sup> Laird, *supra* note 19, at 46.

<sup>23</sup> Gray et al., *supra* note 21, at 792.

<sup>24</sup> Laird, *supra* note 19, at 46.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Laird, *supra* note 19, at 48.

experience difficulty in finding or keeping work,<sup>31</sup> not to mention the shame felt when victims are turned away after seeking help from local law enforcement.<sup>32</sup> Adding insult to injury, victims that contact the sites that host their pictures are sometimes asked for a “fee” in order to remove the content.<sup>33</sup>

Victims of revenge porn often face real-life harassment. In one case, a man impersonated his ex-girlfriend online for years.<sup>34</sup> He would post sexual videos of his ex-girlfriend to pornographic websites, along with her contact information and messages indicating that she liked to have sex with strangers.<sup>35</sup> Men began coming to the victim’s home to solicit sex.<sup>36</sup> In an effort to stop the harassment, the victim changed her name and moved.<sup>37</sup> When her ex-boyfriend found out her new location and new name, he began posting the videos and information all over again.<sup>38</sup>

### III. THE CURRENT STATE OF THE LAW

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While revenge porn may violate state statutes regarding harassment, police often will not act unless the photo or video posted depicts a minor.<sup>39</sup> Currently, only New Jersey and California have passed laws criminalizing revenge porn—that is, “mak[ing] it illegal to post a sexual photo online without the subject’s consent.”<sup>40</sup>

#### A. *New Jersey*

In 2004, New Jersey passed New Jersey Code 2C:14-9,<sup>41</sup> which makes “it a felony to disclose a person’s nude or partially nude image without that person’s consent.”<sup>42</sup> The statute reads as follows:

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<sup>31</sup> *Id.* at 46.

<sup>32</sup> See Introduction *supra* discussing Ms. Chiarini’s ordeal.

<sup>33</sup> *Id.* at 46–47.

<sup>34</sup> Gray et al., *supra* note 21, at 793.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Laird, *supra* note 19, at 47.

<sup>40</sup> *Id.*

<sup>41</sup> N.J. STAT. ANN. § 2C:14-9 (West 2012) (emphasis added).

<sup>42</sup> Danielle Citron, ‘Revenge Porn’ Should Be a Crime, CNN (Aug. 30, 2013, 6:54 AM), [http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html?hpt=hp\\_t4](http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html?hpt=hp_t4).

*1. a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.*

*b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.*

*c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.*

*d. It is an affirmative defense to a crime under this section that:*

*(1) the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c., and*

*(2) the actor acted with a lawful purpose.<sup>43</sup>*

The New Jersey statute is hailed as a model for other states that seek to make revenge porn a crime.<sup>44</sup> Mary Franks, Associate Professor of Law at the University

<sup>43</sup> N.J. STAT. ANN. § 2C:14-9 (West 2012).

<sup>44</sup> Citron, *supra* note 42.

of Miami School of Law, has praised the statutory language as “treat[ing] the conduct seriously while providing specific definitions and affirmative defenses that guard the statute against First Amendment overbreadth.”<sup>45</sup> In fact, the law is almost a decade old and has not faced a serious constitutional challenge.<sup>46</sup>

The law has also been credited as being well ahead of its time.<sup>47</sup> It was enacted years before any of the debate that surrounds such laws today. Of particular note is that the law makes the posting of revenge porn a felony.<sup>48</sup> New Jersey “gave the law enough teeth to serve as a deterrent, threatening those convicted of posting lewd images or video of someone without license or privilege with a third-degree crime, punishable with a prison sentence of 3 to 5 years.”<sup>49</sup> The deterrent effect, in particular, seems to be lacking in many of the other states that have proposed legislation to punish revenge porn.<sup>50</sup> The statute provides specific definitions for nebulous terms such as “disclose.”<sup>51</sup> Furthermore, the defenses listed in the statute, in particular the one giving prior notice,<sup>52</sup> appear to provide protection for the adult film industry and other instances where individuals give consent to have their nude images distributed or published.

### ***B. California***

Where New Jersey’s law has been praised, California’s revenge porn statute is considered an excellent effort that has fallen short.<sup>53</sup> In 2013, California passed Senate Bill 255, codified as CA Penal Code § 647(j)(4), which makes it a misdemeanor to “publish images of another person without their consent ‘with the

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<sup>45</sup> Mary Franks, *Combating Non-Consensual Pornography: A Working Paper*, ENDREVENGEPO.RN.ORG (Oct. 7, 2013, 12:00 AM), [http://www.endrevengeporn.org/main\\_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-10.7.pdf](http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-10.7.pdf).

<sup>46</sup> *Id.*

<sup>47</sup> Ben Giles, *State Legislators Retaliate Against ‘Revenge Porn’ Bills Differ in How They Enforce The Law, Punish Those Who Break It*, LEGALNEWS.COM (Dec. 25, 2013, 12:00 AM), <http://www.legalnews.com/detroit/1384213>.

<sup>48</sup> See Citron *supra* note 42.

<sup>49</sup> *Id.*

<sup>50</sup> See CAL. PEN. CODE § 647(j)(4)(A) & (B) (West 2013), which considers similar conduct to be “disorderly conduct, a misdemeanor[.]”

<sup>51</sup> N.J. STAT. ANN. § 2C:14-9(c).

<sup>52</sup> N.J. STAT. ANN. § 2C:14-9(d)(1).

<sup>53</sup> Julia Dahl, *“Revenge Porn” Law In California a Good First Step, But Flawed, Experts Say*, CBSNEWS.COM (Oct. 3, 2013, 11:54 AM), <http://www.cbsnews.com/news/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/>.



intention to cause serious emotional distress.”<sup>54</sup> As punishment, the statute imposes a fine of up to \$1,000 and up to six months in jail.<sup>55</sup> While this is a good first step, the law is deeply flawed.<sup>56</sup>

The law reads as follows:

*Except as Provided in Subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:*

*(j)(4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image take, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.*

*(j)(4)(B) As used in this paragraph, intimate body part means any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the areola that is either uncovered or visible through less than fully opaque clothing.*<sup>57</sup>

The statutory language of California’s law leaves many victims unprotected. First, the law does not cover “selfies.”<sup>58</sup> This means that if the victim took the picture him or herself, and someone posted it online without their permission, no law has been broken.<sup>59</sup> This is particularly troubling because, “[a]ccording to a recent study by the Cyber Civil Rights Initiative, up to 80% of revenge porn victims belong to this category.”<sup>60</sup> Second, the law does not penalize

<sup>54</sup> *Id.*; see also CAL. PEN. CODE § 647(j)(4)(A) (West 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> CAL. PEN. CODE § 647(j)(4)(A) & (B) (West 2013).

<sup>58</sup> Eric Goldman, *California’s New Law Shows It’s Not Easy to Regulate Revenge Porn*, TECHNOLOGY & MARKETING BLOG (Oct. 16, 2013, 12:00 PM), [http://blog.ericgoldman.org/archives/2013/10/californias\\_new\\_1.htm](http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm).

<sup>59</sup> *Id.*

<sup>60</sup> Franks, *supra* note 45.

redistributors.<sup>61</sup> This means that only the person who makes the recording can be punished.<sup>62</sup> Consequently, the operators of revenge porn websites, who often encourage the posting of these materials, as well as anyone else, who may redistribute the picture or recording, cannot be punished under the law.<sup>63</sup> Third, the law does not cover photos obtained by hacking.<sup>64</sup> While the act of hacking may be covered by other laws, this law does not cover pictures or videos stolen from a victim's computer or cell phone and posted without his or her consent.<sup>65</sup>

The law also only applies to “circumstances where the parties agree or understand that the image shall remain private.”<sup>66</sup> The requirement for confidentiality in the law's language creates a loophole through which perpetrators can evade punishment.<sup>67</sup> In some cases, “the defendant and victim may disagree about their expectations for the recording, which [could] make conviction difficult or impossible.”<sup>68</sup> Furthermore, because the law only applies when defendant acted with “inten[t] to cause the victim severe emotional distress,”<sup>69</sup> prosecutors could face difficulty proving such intent “without an admission from the defendant or a piece of ‘smoking gun’ evidence.”<sup>70</sup> Finally, California's law makes posting revenge porn a misdemeanor—a slap on the wrist compared to the statutory language of New Jersey's law, which makes the same activity a felony.<sup>71</sup>

Both New Jersey and California should be commended on their efforts to combat this issue. Though California's law has received criticism, the law is a strong step towards signaling an acknowledgement by the California Legislature that revenge porn is an issue.<sup>72</sup> The hope now is that a trend will develop with more states passing legislation aimed at combating revenge porn.

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<sup>61</sup> Goldman, *supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Goldman, *supra* note 58.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Part III-A *supra* discussing the New Jersey statute.

<sup>72</sup> Dahl, *supra* note 53.

### C. *Pennsylvania*

Pennsylvania is one of the most recent states to propose legislation to criminalize revenge porn. One proposed revenge porn bill has even passed the Pennsylvania Senate and is currently being considered in the state House.<sup>73</sup> According to Senator Judy Schwank, who proposed the measure, “a person would break the law by revealing a picture or video of an intimate partner to a third party for no legitimate purpose and with the intent to harass, annoy or alarm the person depicted.”<sup>74</sup> “The picture or video,” Schwank said, “must be of a person who is nude or engaged in a sexual act.”<sup>75</sup> In order to evaluate the strength of the law, we will have to wait and see the actual text of the statute, provided that it passes the Pennsylvania House. What can be said about Pennsylvania’s proposed legislation is that, like the New Jersey<sup>76</sup> and California laws, it does little to address or punish the websites that encourage and host revenge porn.<sup>77</sup> Every state should make an effort to protect its citizens from being victimized by revenge porn. However, even if all 50 states passed legislation to criminalize revenge porn, this would only solve half of a very complicated equation. In order to truly battle revenge porn, legislation is needed on both the state and federal level. Federal legislation is specifically necessary to punish those who create and manage the websites that host and encourage revenge porn.

## IV. REVENGE PORN HOSTS

Providing criminal penalties for those who knowingly post nude photos of others without their consent is only part of the solution. The online forums that host

<sup>73</sup> Mary Wilson, ‘Revenge Porn’ Measure Moves to Pa. House, NEWSWORKS.ORG (Feb. 3, 2014, 12:00 AM), <http://www.newsworks.org/index.php/local/item/64392-revenge-porn-measure-moves-to-pa-house>.

<sup>74</sup> Channel 69 News, *Revenge Porn: Pennsylvania Sen. Judy Schwank Proposes Law Against It*, WFMZ (Dec. 11, 2013, 5:58 PM), <http://www.wfmz.com/news/news-regional-berks/revenge-porn-pennsylvania-sen-judy-schwank-proposes-law-against-it-/121418/23432382/-/uufk6qz/-/index.html>.

<sup>75</sup> *Id.*

<sup>76</sup> Note that while the statutory language of New Jersey’s revenge porn law, which applies to anyone who “reproduces in any manner, the image of another person whose intimate parts are exposed . . .” (N.J. STAT. ANN. § 2C:14-9(b)), could arguably extend to websites that host revenge porn, New Jersey’s jurisdiction over these websites is uncertain. This is an interesting question that is beyond the scope of this article. For the purposes of this article, I assume that only a federal statute would have jurisdiction over the websites that redistribute/host revenge porn.

<sup>77</sup> Wilson, *supra* note 73.

and often encourage production of these materials pose a greater legal challenge.<sup>78</sup> “Before the Internet . . . compromising photos could do limited harm because they stayed within a few people’s hands.”<sup>79</sup> With the widespread proliferation of the Internet, “purpose-built sites” have emerged, and their only “intent is to publicly shame, humiliate and degrade the victim.”<sup>80</sup> So long as the perpetrators of revenge porn have a readily available forum where they can violate the privacy of their victims, revenge porn will continue.

While some revenge porn sites have been shut down, many more have sprung up in their place.<sup>81</sup> These websites are wholly dedicated to the posting of revenge porn, often times encouraging people to post pictures and videos. Not only do these sites post images, videos, and the victim’s personal information, they also include comment sections where others can join in on degrading the victim.<sup>82</sup> In addition to humiliating the victim, at least one website sought to capitalize monetarily on its victims. Kevin Christopher Bollaert, the founder of a popular revenge porn site, would email victims after he had posted their pictures to his site and ask them for money in exchange for taking the pictures down.<sup>83</sup> He was not the only website operator to execute such a scheme.<sup>84</sup>

A primary issue in taking on revenge porn websites comes from the Communications Decency Act, 47 U.S.C. § 230, which provides that “websites and hosts have broad immunity from legal responsibility for content posted by users.”<sup>85</sup> Some legal experts believe this provision protects revenge porn websites because these websites are essentially just forums where third parties submit their own material.<sup>86</sup> In effect, the same law that protects Facebook and YouTube from legal

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<sup>78</sup> Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, TECHNOLOGY & MARKETING BLOG (Feb. 9, 2013, 12:00 PM), [http://blog.ericgoldman.org/archives/2013/02/what\\_should\\_we.htm](http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm).

<sup>79</sup> Laird, *supra* note 19, at 47.

<sup>80</sup> *Id.*

<sup>81</sup> James Fletcher, *The Revenge Porn Avengers*, BBC WORLD SERVICE (Dec. 11, 2013, 2:25 PM), <http://www.bbc.co.uk/news/magazine-25321301>.

<sup>82</sup> Laird, *supra* note 19, at 46.

<sup>83</sup> Amanda Marcotte, *California Arrests the Owner of a Revenge Porn Site. Other States Should Follow its Lead*, SLATE (Dec. 11, 2013, 1:00 PM), [http://www.slate.com/blogs/xx\\_factor/2013/12/11/kevin\\_bollaert\\_arrested\\_for\\_revenge\\_porn\\_california\\_s\\_move\\_is\\_a\\_promising.html](http://www.slate.com/blogs/xx_factor/2013/12/11/kevin_bollaert_arrested_for_revenge_porn_california_s_move_is_a_promising.html).

<sup>84</sup> See Laird, *supra* note 19, at 46–47.

<sup>85</sup> Fletcher, *supra* note 81.

<sup>86</sup> Laird, *supra* note 19, at 50.

liability for comments and videos is being used as a shield by revenge porn sites and their proprietors.<sup>87</sup>

## V. AMENDING THE COMMUNICATIONS DECENCY ACT

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### A. *Why amend § 230?*

47 U.S.C. § 230 should specifically be amended to deprive websites of legal protection for conduct that constitutes the posting of revenge porn. Section 230 specifically “provide[s] protection to publishers, broadcasters, and other media entities from a broad range of claims relating to content posted on their websites by third parties.”<sup>88</sup> Specifically, the law provides that websites, which act as forums for others to post content, are not responsible for the “creation or development of the content,” and therefore are immune from many types of liability.<sup>89</sup> The logic behind this protection is that it would be impossible for websites to screen possibly millions of posts per day for potential legal issues.<sup>90</sup> Congress feared that a lack of legal protection could cause websites to limit the number or types of posts that users could generate, resulting in the restriction of free speech.<sup>91</sup>

The protections afforded to websites under § 230 make logical sense. Take something as simple as a defamatory statement made about a city official. Imagine that the defamatory statement was posted in the comment section of CNN’s website under an article about that city official. A person who reads the CNN article, and similarly dislikes this city official, then uses Twitter to tweet the defamatory statement. A friend sees the tweet and then posts the defamatory statement onto Facebook. The fear is that without the protections of § 230, in this scenario, CNN, Twitter, and Facebook could each possibly be held liable for hosting the defamatory material even though none of their employees posted the statement. Few would argue that websites like those listed above should be held liable for content generated by their users. But should revenge porn websites be able to avail themselves of this same protection?

The typical format of a revenge porn website somewhat mimics social media platforms like Instagram or Pinterest. The website acts as a host and allows the

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<sup>87</sup> Fletcher, *supra* note 81.

<sup>88</sup> Edward Fenno & Christina Humphries, *Protection Under CDA § 230 and Responsibility For “Development” of Third-Party Content*, 28 COMMS. LAW 2, para. 5 (Aug. 2011); *see also* 47 U.S.C. § 230 (2012).

<sup>89</sup> *Id.* ¶ 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

users to upload content, and often includes a section where users can make comments. Since the revenge porn site itself does not produce any content, as all of the content is provided by third party users who upload photos and videos, the websites are arguably protected by § 230.<sup>92</sup>

Section 230 has left victims with very shaky legal ground on which to defend themselves. Some victims have resorted to using copyright law as a means of having their photos removed. “[I]f the photo was a self-portrait, the victim owns the copyright automatically. Without registering it, he or she is free to send takedown notices to the website’s operator . . . .”<sup>93</sup> This will not likely result in an award of damages, but “can provide an injunction against posting the photos online . . . .”<sup>94</sup> One issue with relief coming in the form of an injunction, however, is that “foreign websites don’t care about . . . takedown notices.”<sup>95</sup> Smart website operators will simply move to overseas hosts to avoid any consequences for their actions, and several have already done so.<sup>96</sup> Additionally, if the victim did not take the picture, copyright law does not provide protection.<sup>97</sup> This is a prime example of how the existing legal framework does not provide adequate protection for revenge porn victims. The letter of the law appears to provide ample protection to revenge porn websites, but the question remains: did the legislature intend to extend the protections of § 230 to websites that exist solely to demean, degrade, and endanger others? I do not believe this was the intention of the legislature.

In order to stop revenge porn, Congress should adopt a narrow amendment to § 230 that denies protection to websites that facilitate and reproduce revenge porn.<sup>98</sup> Without this amendment, victims of revenge porn will have no chance of protecting themselves from harm. State laws may penalize the conduct of posting the photos to the Internet, but federal law is needed in order to deny those people a forum for victimizing others. Because revenge porn websites are arguably protected from liability, some victims have described their efforts to get their photos or videos removed as “a nightmare game of whack-a-mole,” meaning that

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<sup>92</sup> Goldman, *supra* note 78.

<sup>93</sup> Laird, *supra* note 19, at 49.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Franks, *supra* note 45, at 5 “this option [copyright] will not be of use to the many victims who do not take the images or videos themselves.”

<sup>98</sup> Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013, 12:00 AM), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html>.

as soon as one website would take down the photos down, another one would post them again.<sup>99</sup> In some instances, victims who contacted websites requesting that their photos be removed later find that the website has posted the images to another site in retaliation.<sup>100</sup> Put bluntly, state laws may penalize and deter others from posting revenge porn, but they do nothing to aid the victim in removing the harmful content once it has been posted. The problem of revenge porn can only be solved by legislative action at both the state and federal level.

### ***B. Arguments Against Amending § 230***

Amending § 230 sounds like a simple enough solution, but some are adamantly opposed.<sup>101</sup> In fact, at least one commentator argues creating an exception to § 230 would create “mischief.”<sup>102</sup> In his tech focused legal blog, Eric Goldman argues there have been disturbing efforts to exploit the existing exceptions to § 230 and that an additional exception would invite similar actions.<sup>103</sup> Mr. Goldman also argues that “all content regulation schemes are necessarily over- and under-inclusive,” and therefore any efforts to amend § 230 to address revenge porn would invariably be “imperfect.”<sup>104</sup> I respectfully disagree with Mr. Goldman on these issues.

I do not wish to single out Mr. Goldman for his views. In fact, I find Mr. Goldman’s commentary on this issue to be intelligent and thought-provoking. I mention his commentary specifically because I find it to be in line with much of the anti-regulation attitude that appears to have shaped the debate on this aspect of the issue. Like Mr. Goldman, there are those who disfavor regulation and believe the fix to this problem should not be legislative or regulatory. Instead, those who hold these views suggest free market solutions such as pressuring Google to “reduce the visibility of these sites,” allowing public opinion and media coverage to pressure the financial backers of these sites to withdraw (choking off any financial incentives for these sites to operate), and changing social norms regarding nudity and sexuality.<sup>105</sup> I do not believe that the solutions advanced by Mr. Goldman and

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<sup>99</sup> Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE (Sept. 25, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/09/revenge\\_porn\\_legislation\\_a\\_new\\_bill\\_in\\_california\\_doesn\\_t\\_go\\_far\\_enough.html](http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html).

<sup>100</sup> Laird, *supra* note 19, at 49.

<sup>101</sup> See Goldman, *supra* note 78.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

others are wrong; in fact, I believe these are good suggestions that should be considered in conjunction with legislative efforts. However, his aversion to a regulatory solution is short sighted.

Free market solutions do little to aid those currently suffering the consequences that stem from having their most intimate moments posted online. I would find it difficult to tell a woman who is being harassed by people online, or has just been fired from her job, that she should “wait it out” because she has no legal recourse. Mr. Goldman’s assertion that an amendment to § 230 would be susceptible to exploitation<sup>106</sup> may very well be correct, but careful drafting and a narrow reading by the courts can reduce the dangers of exploitation. Additionally, the value of the widespread relief that would be provided to these victims, through a narrowly drafted exception, would outweigh the danger of its possible abuse.

Mr. Goldman’s second assertion that all content regulation schemes are invariably imperfect<sup>107</sup> is also correct. Any efforts by the legislature to eliminate revenge porn websites will undoubtedly leave “some activity undressed,”<sup>108</sup> but that does not justify inaction on the issue. While I would like to see free market solutions such as financial backers of these website withdrawing their support due to public pressure, this takes time and victims are being harmed right now. Mr. Goldman also ignores the fact that the motivation behind these sites may not even be financial; often the motive for these sites, as their name suggests, is revenge. A person bent on “punishing” a past lover for perceived wrongs might operate one of these sites at a financial loss in order to achieve his or her goal of enacting revenge.

Some believe the actions of revenge porn site operators are protected by the First Amendment.<sup>109</sup> In fact, the American Civil Liberties Union (“ACLU”) previously opposed an early version of California’s revenge porn law.<sup>110</sup> The ACLU dropped its objection when language was added “to the final version of the bill, which required that the person who posted revenge porn had to do so with the

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<sup>106</sup> *See id.*

<sup>107</sup> *See* Goldman, *supra* note 78.

<sup>108</sup> *See id.*

<sup>109</sup> Erin Fuchs, *Here’s What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUSINESS INSIDER (Oct. 1, 2013, 1:08 PM), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9> (quoting former judge Andrew Napolitano “First Amendment protection should extend to revenge porn”).

<sup>110</sup> *Id.*



intent to ‘cause serious emotional distress.’”<sup>111</sup> Scholars and commentators who believe that laws punishing the online publishing of revenge porn violate the First Amendment cite to recent Supreme Court decisions that have protected other types of unsavory speech.<sup>112</sup> These decisions include the overturning of “a law that banned videos showing graphic violence against animals[,]” and a recent holding that a church had “a right to hold hateful protests outside of military funerals.”<sup>113</sup>

Other scholars hypothesize that, if and when the issue finds its way to the courts, “the courts [will] rightly conclude that as a categorical matter . . . such nude pictures indeed lack First Amendment value.”<sup>114</sup> John S. Morgan, an attorney representing plaintiffs in a class action lawsuit against one of the largest revenge porn site operators, states, “revenge porn is obscenity not protected by the First Amendment because, unlike conventional pornography . . . revenge porn requires no consent and no age verification.”<sup>115</sup> Similarly, scholar and commentator Diane Citron believes that “listeners and speakers have no legitimate interest in nude photos or sex tapes published without the subjects’ permission” and that revenge porn “lacks First Amendment value as a historical matter, and could be understood as categorically unprotected as obscenity.”<sup>116</sup> As this issue finds its way to the courts, we will have to wait and see whether the act of posting revenge porn receives First Amendment protection.

## VI. NON-LEGAL OBSTACLES

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One of the main problems facing those who seek to outlaw revenge porn is a lack of empathy amongst the general population. In my research on this topic, I cannot help but notice an attitude that these victims “brought it upon themselves.” This attitude has been exemplified in both scholarly commentary and comment sections from blogs and news articles on the topic.<sup>117</sup> Within the comments section of any online news article on the topic of revenge porn you will likely find

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; see *United States v. Stevens*, 559 U.S. 460 (2010); also see *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>114</sup> *Id.*

<sup>115</sup> Laird, *supra* note 19, at 50.

<sup>116</sup> See Citron, *supra* note 42.

<sup>117</sup> See Goldman, *supra* note 78 (stating that for individuals “who would prefer not to be a revenge porn victim . . . the advice will be simple: don’t take nude photos or videos.”); see also Citron, *supra* note 42 (comment stating that “we are going to legislate to protect stupidity . . .”).

comments that refer to the victims as either “stupid” or “slutty.”<sup>118</sup> Because of the sexual nature of the problem, and the initial consent that is often involved, I believe that it is easy for many to lose sight of the fact that these victims have done nothing wrong. Some victims have their photos stolen from them through elaborate computer hacking schemes.<sup>119</sup> If someone took a nude Polaroid and put it in a drawer in their house, and their house was subsequently broken into and the picture was stolen, it would not make sense to blame the burglary victim.<sup>120</sup> People have a right to take nude photographs of themselves if they so choose. Consent to share those photos in one context is not a license to post them on the Internet for all to see. One commentator has phrased the issue as follows: “just as a boxer hasn’t consented to be punched outside the ring, someone who sends a . . . picture to a lover has not consented to have that picture distributed online.”<sup>121</sup>

It appears the reason many Americans find it hard to sympathize with victims is because they “choose” to take these photos. The reality is that these photos are incredibly common, especially among teens, due to a dramatic rise in popularity of sexting.<sup>122</sup> Reasons for the increase in sexting go beyond the scope of this article, but suffice it to say that a recent survey reports that 65.5% of teens between the ages of 13–19 have sexted.<sup>123</sup> This means if you have a teenage son or daughter, chances are that your son or daughter has probably sent a nude photo to a boyfriend or girlfriend, and therefore could also fall victim to revenge porn. Regardless of one’s moral views on the topic, the reality of the situation is this phenomenon is hurting real people, primarily young women. It results in lost jobs, lost relationships, lost friendships, and in extreme cases, physical harm.<sup>124</sup> The only way that this epidemic will end is if we pressure our state legislatures and Congress to make the posting of revenge porn a crime.

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<sup>118</sup> Laird, *supra* note 19, at 48.

<sup>119</sup> *Id.* at 50.

<sup>120</sup> Fletcher, *supra* note 81.

<sup>121</sup> Laird, *supra* note 19, at 48.

<sup>122</sup> See Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135, 140–41 (2010) (citing various statistics on teen sexting habits). Sara Wastler, *The Harm in “Sexting”?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 687 (2010) (stating that sexting is the act of sending sexually explicit pictures or messages via mobile phone).

<sup>123</sup> McLaughlin, *supra* note 122, at 140–41.

<sup>124</sup> Laird, *supra* note 19, at 46.

## CONCLUSION

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The Internet has revolutionized communication and democratized information. For the first time in history, the average person can freely express herself on a forum that is shared by everyone from children to heads of state. As technology advances exponentially, our legal system will inevitably struggle to keep up. Revenge porn is a prime example of how technology has out-paced the law. The crime itself is not new; people have probably been blackmailed and harassed with inappropriate photos since the invention of the hand held camera. What is new is the platform on which that harassment can now take place. We must act now to put an end to this dangerous trend. In order to properly address this issue, legislation must be passed at both the state and federal level. Each state should enact laws that make the online posting of nude and sexually explicit photos without consent and age verification a crime. Section 230 of the Communications Decency Act should be narrowly amended to give victims of revenge porn recourse against the websites that host these images. If state and federal legislation is not enacted, this problem will continue to evade the law and further damage the lives of victims.<sup>125</sup>

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<sup>125</sup> I encourage victims of revenge porn to visit [www.endrevengeporn.org](http://www.endrevengeporn.org). The website provides resources for victims and ways to get involved in legislative efforts.